Commercial Union Assurance (M) Sdn Bhd v Pilihan Megah Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2–25–47 OF 1998
AZMEL J
24 DECEMBER 1998

Arbitration *— Award — Setting aside — Error of law on face of award — Arbitrator awarded consequential loss to respondent under insurance policy — Whether 'consequential loss' in insurance different in concept from that used in contract or tort*

The applicant — an insurance company — agreed to indemnify the respondent of any loss or damage to the property, which was insured for RM2.4m, under a contractors all risk policy. The policy was taken out in respect of contract works that were being carried out on a development project known as the Bandar Puchong Jaya project. As a result of massive landslips at the Kuala Lumpur-Puchong road, parts of the main drains which were under construction collapsed. The contract works involved at that time were the execution and completion of the drainage system of Bandar Puchong Jaya. The respondent suffered loss and damage as a result of landslips and a claim was made to the applicant under the policy for: (a) the cost of drains and materials damaged due to the collapse; (b) the cost of drains not damaged but rendered unsuitable by reason of the order of the local authorities to relocate the drainage system; and (c) the actual costs incurred in constructing the new drains at the new location. Because of the existence of differences between the parties in the claim for items (b) and (c), the matter was referred to arbitration. The arbitrator allowed the respondent's claim in respect of items (a), (b) and (c). The applicant then applied to the High Court for an order that part of the award be set aside, varied or remitted for reconsideration by the arbitrator. It contended that the arbitrator had made errors of law on the face of the award when he decided that the applicant was liable under the policy to pay to the respondent the costs of constructing the new drains at the new location. The respondent argued that even if there was an error of law, a specific question of law was referred to the arbitrator and as such no appeal lay in respect of the award.

Held, allowing the application:

(1) When one takes an insurance policy to cover his property against any form of risk, it presupposes that the property must exist before or during the currency of the period of insurance. In the present case, construction of new drains at a different location was only made after the incident had taken place. It certainly did not exist at the time when the incident happened. Such loss would undoubtedly come within the category of consequential loss. But then the policy had excluded any claim for consequential loss of any kind or description whatsoever (see p 39C–E).

(2) The arbitrator had made an error of law concerning the legal meaning of the words 'consequential loss' using it in the context of a contractual or tortious claim, which is different from the understanding found in the insurance industry. In an insurance contract, the extent of the risk assumed by the applicant had been pre-determined. In this case, the amount insured was determined at RM2.4m being the original value of the contract to construct the drains. Therefore the use of the concept of 'forseeability' of loss or loss 'resulting directly and naturally' is wrong and unsustainable in insurance law (see p 39F–G).

(3) Item (c) of the claim is consequential loss not aniticipated or determined at the time of the signing of the insurance contract. The arbitrator had committed errors of law in the course of arriving at the conclusion that the respondent was entitled to item (c) of the claims as well. This is certainly not a case of the arbitrator committing errors of law in the course of determining a specific question of law expressly asked of him to make (see p 40B–C).

[Bahasa Malaysia summary

Pemohon — sebuah syarikat insurans — telah bersetuju untuk menanggung rugi penentang atas mana-mana kerugian atau ganti rugi kepada hartanah, yang telah diinsuranskan bagi RM2.4 juta, di bawah polisi insurans segala risiko. Polisi tersebut telah diambil berhubung dengan kerja-kerja kontrak yang dijalankan atas sebuah projek pembangunan yang dikenali sebagai projek Bandar Puchong Jaya. Akibat runtuhan tanah yang dahsyat di jalan Kuala Lumpur-Puchong, sebahagian daripada parit-parit utama yang sedang dibina telah roboh. Kerja-kerja kontrak yang terlibat ketika itu adalah perlaksanaan dan penyempurnaan sistem perparitan Bandar Puchong Jaya. Penentang telah mengalami kerugian dan ganti rugi akibat runtuhan tanah tersebut dan satu tuntutan telah dibuat kepada Pemohon di bawah polisi tersebut untuk: (a) kos parit dan bahan-bahan yang rosak disebabkan runtuhan tersebut; (b) kos parit-parit yang tidak rosak tetapi menjadi tidak sesuai disebabkan oleh arahan pihak berkuasa tempatan untuk menempatkan semula sistem perparitan tersebut; dan (c) kos sebenar yang dialami dalam membina parit-parit baru di lokasi yang baru. Disebabkan wujudnya perbezaan antara pihak-pihak dalam tuntutan tersebut bagi perkara (b) dan (c), perkara tersebut telah dirujuk kepada timbangtara. Penimbangtara telah membenarkan tuntutan penentang berhubung perkara-perkara (a), (b) dan (c). Pemohon kemudiannya memohon kepada Mahkamah Tinggi untuk mendapatkan perintah supaya sebahgian daripada Award tersebut diketepikan, diubah atau diremitkan untuk pertimbangan semula oleh penimbangtara. Ianya menegaskan bahawa penimbangtara telah membuat kesilapan undang-undang menurut award tersebut apabila beliau memutuskan bahawa pemohon adalah

A bertanggungan di bawah polisi tersebut untuk membayar kepada penentang kos membina parit yang baru di lokasi baru. Penentang telah berhujah bahawa walaupun sekiranya terdapat kesilapan undang-undang, sesuatu persoalan undang-undang yang khusus telah dirujuk kepada penimbangtara dan dengan yang demikian tiada rayuan disediakan berhubung award tersebut.

B

Diputuskan, membenarkan permohonan:

(1) Apabila seseorang mengambil suatu polisi insurance untuk melindungi hartanahnya, terhadap sebarang bentuk risiko, ianya menjangkakan bahawa hartanah tersebut semestinya
C wujud dahulu atau ketika berkuatkuasanya tempoh insurans tersebut. Dalam kes semasa, pembinaan parit baru di lokasi yang berlainan hanya dibuat selepas peristiwa tersebut berlaku. Ianya pasti tidak wujud pada waktu peristiwa itu berlaku. Kerugian yang sedemikian tanpa diragui lagi terlingkung di
D bawah kategori kerugian sampingan. Tetapi namun begitu polisi tersebut telah tidak memasukkan sebarang tuntutan untuk kerugian sampingan yang apa jenis atau apa penjelasan sekalipun (lihat ms 39C–E).

(2) Penimbangtara telah membuat kesilapan undang-undang
E mengenai makna undang-undang bagi perkataan-perkataan 'consequential loss' menggunakannya dalam konteks tuntutan tort atau kontraktual, yang mana berbeza daripada kefahaman yang terdapat dalam industri insurans. Dalam sesebuah kontrak insurans, had risiko yang diambil oleh pemohon telah ditentukan lebih awal. Dalam kes ini, jumlah yang diinsuranskan telah
F ditentukan pada RM2.4 juta yang merupakan nilai asal kontrak tersebut untuk membina parit tersebut. Dengan itu penggunaan konsep 'foreseeability' kerugian atau kerugian 'resulting directly and naturally' adalah salah dan tidak boleh dipertahankan dalam undang-undang insurans (lihat ms 39F–G).

G (3) Perkara (c) tuntutan tersebut adalah kerugian sampingan yang tidak dijangkakan atau ditentutan pada waktu menandatangani kontrak insurans tersebut. Penimbangtara telah melakukan kesilapan undang-undang dalam mencapai keputusan bahawa penentang berhak kepada perkara (c) tuntutan tersebut juga. Ini
H sudah pasti bukannya suatu kes penimbangtara melakukan kesilapan undang-undang, dalam menentukan satu persoalan undang-undang khusus yang dengan nyatanya diminta beliau membuatnya (lihat ms 40B–C).]

I **Notes**

For cases on setting aside of an award, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 957–979.

Cases referred to

FR Absalom Ltd v Great Western (London) Garden Village Society Ltd [1933] AC 592 (folld)

Montgomery Jones & Co v Liebenthal (1898) 78 LT 406 (refd)

Ong Guan Teck & Ors v Hijjas [1982] 1 MLJ 105 (refd)

Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (folld)

Theobald v The Railway Passengers Assurance Co (1854) 10 Exch 45 (refd)

Porres Royan (*TJ Lee* with him) (*Shook Lin & Bok*) for the applicant.

K Rajendra (*Selvaratnam* with him) (*Azman Davidson & Co*) for the respondent.

Azmel J: The applicant in this case applied by way of an originating motion for an order that part of the award of the arbitrator Raja Aziz Addruse published on 1 April 1998 be set aside, varied or remitted for reconsideration by the aforesaid arbitrator.

The brief facts of the case are as follows. By a contractors all risk policy the applicant, an insurance company, agreed to indemnify the respondent in respect of loss or destruction or damage to property insured arising from any cause not otherwise specifically excluded by the policy. The policy was taken out in respect of contract works that were being carried out during the material times pertaining to a development project known as Bandar Puchong Jaya Project. The property that were covered under the policy were 'the permanent and temporary works and materials and all other things belonging to the respondent or for which he is responsible, brought on to the situation of the contract for the purposes of the contract and the contractors' plant, machinery and equipment whilst at the situation of contract, the property of the respondent as for which he is responsible.' The property was insured for the sum of RM2.4m.

As a result of massive landslips on or about 20 December 1993 (which were preceded by heavy rainfall and flooding) at around kilometer 16 of the Kuala Lumpur-Puchong road, parts of the main drains which were under construction collapsed. The contract works that were involved at the time of the said incident were 'the execution and completion of the main drainage system of Bandar Puchong Jaya.'

As a result of the aforesaid incident, the drainage system was redesigned, realigned and constructed at a different location by the respondent. By reason of the aforesaid, the respondent alleged that it had suffered loss and damage and consequently a claim was made to the applicant under the policy for the followings:

(a) the cost of drains and of materials damaged or rendered unsound due to the collapse — RM552,839.76

(b) the costs of drains not damaged but rendered unsuitable by reason of the order of the local authorities to relocate the drainage system — RM469,929.13

A (c) the actual costs incurred in constructing the new drains at the new location — RM7,147,883.43

At the beginning, the applicant only agreed to be liable under item (a) of the claim. Because of the existence of difference between the parties in the claim for items (b) and (c), the matter was referred to arbitration and both B parties jointly agreed to appoint Raja Aziz Addruse as a single arbitrator to adjudicate upon the said difference.

In the course of the proceedings before the arbitrator, the applicant abandoned its defence of defective design of the drainage system. This means that the applicant no longer disputed liability. Hence the only issue C to be determined by the arbitrator is the amount which the respondent was entitled to recover under the policy.

In this award dated 30 March 1998, the arbitrator allowed the respondent's claim in respect of items (a), (b) and (c). The applicant in this application was not challenging items (a) and (b) of the claim. It was only in respect of item (c) that the applicant alleged that the arbitrator had made errors D of law on the face of the award where the arbitrator decided that the applicant was liable under the policy to pay to the respondent the costs of constructing the new drains at the new location amounting to RM7,147,883.43.

Hence the main issue that need to be determined in this case is whether there was an error of law on the face of the award committed by the E arbitrator in awarding damages to the respondent under item (c) of the claim. Counsel for the respondent strenuously argued that there was no error of law on the face of the award. He further argued that even if there was an error of law a specific question of law was referred to the arbitrator and as such no appeal lies in respect of the award.

F It has been well established that in order for an award of the arbitrator to be set aside, varied or remitted for consideration by the court, there must exist one of the four grounds as held in the case of *Montgomery Jones & Co v Liebenthal* (1898) 78 LT 406 where Chitty LJ said:

> I agree there are four grounds upon which the matter can be remitted to an arbitrator for reconsideration. Those grounds are: (i) where the award is bad G on the face of it; (ii) where there has been a misconduct on the part of the arbitration; (iii) where there has been an admitted mistake and the arbitrator himself asks that the matter be remitted; and (iv) where additional evidence has been discovered after the making of the award.

The principle of the above English case had been followed and applied H locally in the case of *Ong Guan Teck & Ors v Hijjas* [1982] 1 MLJ 105. Hashim Yeop A Sani J (as he then was) held that (at p 107):

> ... It has also been held as settled law as early as 1898 in *Montgomery Jones & Co v Liebenthal & Co* that the following grounds would constitute good grounds for the court to remit an award, namely: (i) that the award is bad on the face of it; (ii) that there has been a misconduct on the part of the I arbitration; (iii) that there has been an admitted mistake and the arbitrator asks that the matter may be remitted; and (iv) where additional evidence has been discovered after the making of the award.

There are, however, limits for the court to exercise its discretion in setting aside an award of the arbitrator on the ground of error of law on the face of the award. One of the limits is clearly illustrated in the House of Lords case of *FR Absalom Ltd v Great Western (London) Garden Village Society Limited* [1933] AC 592 where Lord Warrington of Clyffe in his decision held (at p 598):

> The question in the present appeal is whether the award is bad by reason of error in law appearing on the face of it. This involves the further question, whether the question of law decided by the arbitrator was specifically referred to him for his decision or was only one which necessarily arose in applying ascertained facts to the terms of the contract.

Lord Warrington went on to say (at p 602):

> ... I think it is clear that ... in order to come within the rule that a decision of an arbitrator on a point of law is final, it must be shown that the point is specifically referred. It recognizes the distinction between cases in which a question of law is specifically referred for decision and those in which such a question is involved incidentally, as it is in the present case.

This decision of the House of Lord had been approved and applied locally (see *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210).

It is my intention to apply the principle as stated above in considering the application before me. The main issue that this court need to determine is whether there was error of law on the face of the award committed by the arbitrator and if there was whether the question of law decided by the arbitrator was specifically referred to him for his decision. Counsel for the respondent had strenuously argued that the arbitrator had committed no error of law and even if he had done so, the question of law decided by him was specifically referred to him.

The impugn part of the decision of the arbitrator is in respect of item (c) of the claim where the arbitrator held that the applicant was liable to pay for the cost of construction of the new drains, in the sum of RM7,147,883.43.

What the applicant/insurers agreed to indemnify the respondent/insured under the insurance policy was that 'if during the period of insurance ... any part of the property insured shall be lost, destroyed or damaged as referred to in s 1 hereof ... the insurers will indemnify the insured as provided hereunder.'

The property insured is described as:

> The permanent and temporary works and the materials and all other things belonging to the insured or for which he is responsible brought on to the situation of the contract for the purposes of the contract.

The errors of law alleged by the applicant that had been made by the arbitrator in the award are:

(1) the respondent is entitled to the cost of construction of the new drains; and

(2) Exception No 9 of the policy does not apply.

In respect of the first error of law, the arbitrator in his award had made the following legal findings:

> (i) I cannot however accept the claimant's argument that the fact of the policy being an 'all-risk' policy would necessarily entitle the claimant to be indemnified in respect of all the losses being claimed. The term 'all-risks' defines the perils to be covered by the policy but cannot entitle the claimant to recover any loss (of whatever nature) which it may suffer from the peril (para 4.6(2) of the award).
>
> (ii) By the policy ... the property insured was 'the permanent and temporary works and materials' involved in the construction of the main drains under the contract described as the 'Bandar Puchong Jaya Project.' The words emphasised necessarily imply that what is intended to be covered by the policy is the works (para 4.6(3) of the award).

Yet, contrary to the above findings, the arbitrator held that 'the loss to the claimant is the cost of the construction of the new drains.' I find it very difficult to see the logic of such finding of the arbitrator. When one takes an insurance policy to cover his property against any form of risk, it pre-supposes the that the property must *exist* before or during the currency of the period of insurance. In the present case, construction of new drains at a different location was only made after the incident had taken place. It certainly did not exist at the time when the incident happened. It is clear to me that such loss would undoubtedly come within the category of consequential loss. But then the policy had excluded any claim for consequential loss of any kind or description whatsoever.

Yet the arbitrator in his alternative holding in the award said:

> Exception 9 does not apply as these are not claims in respect of consequential loss but are for loss resulting directly and naturally from the claimant's having to construct the new drains (para 4.8(1) of the award).

In this respect, I agree entirely with the submission of the counsel for the applicant that the arbitrator had made an error of law concerning the legal meaning of the words 'consequential loss' using it in the context of a contractual or a tortious claim, which is different from the understanding found in the insurance industry. In insurance contract the extent of the risk assumed by the applicant had been pre-determined. In this case, the amount insured was determined at RM2.4m being the original value of the contract to construct the said drains. Therefore the use of the concept of 'forseeability' of loss or loss 'resulting directly and naturally' is wrong and unsustainable in insurance law. This is not a claim for a breach of contract or for a breach of tortious duty. This is a claim for indemnity under the insurance policy. Malcolm A Clarke in his book *Insurance Contracts* (2nd Ed) said:

> So, whether an insurance contract covers consequential loss is a matter of the terms of the contract concerned. The insurance industry's notion of consequential loss is quite different from that of the lawyer.

And in the case *Theobald v The Railway Passengers Assurance Co* (1854) 10 Exch 45, Pollock CB said:

What the insurance company calculate on indemnifying the party against is the expense and pain and loss immediately connected with the accident and not remote consequence that may follow according to the business or profession of the passenger.

The proper nature of claims that come within the meaning of 'loss immediately connected with incident' and 'consequently loss' is items (a) and (b) of the respondent's claim. In my view item (c) of the claim is consequential loss not anticipated or determined at the time of the signing of the insurance contract.

Based on the reasons as I have stated above, I arrived at the conclusion that the arbitrator had committed errors of law when he held that the respondent was entitled to also claim item (c) of its claim. He committed these errors of law in the course of his arriving at the conclusion that the respondent was also entitled to item (c) of the claims as well. This is certainly not a case of the arbitrator committing errors of law in the course of determining a specific question of law expressly asked of him to make. I was unable to find any specific question of law asked of him by any party. No mention of it was made by the arbitrator in his award. I therefore ordered that that part of the award pertaining to item (c) be set aside.

In the circumstances, I allowed this application with costs.

Application allowed with costs.

Reported by Ng Sheau Jiuan